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NO. 88-6059

In The

SUPREME COURT OF THE UNITED STATES,

October Term, 1988

RHETT G. DEPEW,

Petitioner,

v.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

I. Whether the alleged misconduct of a prosecuting attorney during the sentencing phase of a capital trial is subject to harmless error analysis under Satterwhite v. Texas, 486 U.S. ____, 100 L.Ed.2d 284, 108 S.Ct. ___ (1988), and Darden v. Wainwright, 477 U.S. 168, 91 L.Ed.2d 144, 106 S.Ct. 24 (1986), where it does not deprive the defendant of a fair trial.

II. Whether it is consistent with the decision in Satterwhite v. Texas, 486 U.S. ____, 100 L.Ed.2d 284, 108 S.Ct. ___ (1988), to apply a harmless error analysis to alleged errors of prosecutorial misconduct occurring during the sentencing phase of a bifurcated capital proceeding.

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Respondent, State of Ohio, prays that a petition for a writ of certiorari herein be denied.

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OPINIONS BELOW

The decision of the Supreme Court of Ohio is reported at 38 Ohio St. 3d 275, 528 N.E.2d 542. The decision of the Court of Appeals, Twelfth Appellate District of Ohio, is unreported and is appended to the Petition at pages A-35 through A-65. The decision of the Court of Common Pleas of Butler County, Ohio, is unreported and is appended to the Petition at pages A-66 through A-72.

JURISDICTIONAL STATEMENT

This appeal is from the decision of the Supreme Court of Ohio wherein the Petitioner's conviction and sentence of death for three counts of aggravated murder with specifications was affirmed. [**State** v. **DePew**, 38 Ohio St. 3d 275, 528 N.E.2d 542 (1988).]

STATEMENT OF THE CASE

Petitioner Rhett G. DePew was indicted in April, 1985 for three counts of aggravated murder, in violation of Ohio Revised Code §2903.01(B), in connection with the deaths of Teresa Jones, Aubrey Jones, and Elizabeth Burton on November 23, 1984. Each aggravated murder count contained three specifications: (1) that the offense was committed while Petitioner was committing aggravated burglary; (2) that the offense was committed while Petitioner was committing aggravated arson; and (3) that the offense was part of a course of conduct involving the Petitioner's purposeful killing of two or more persons, pursuant to Ohio Revised Code §§2929.04(A)(7), (A)(7), and (A)(5), respectively.

On the evening of November 23, 1984, Petitioner DePew went to the residence of Tony and Teresa Jones at 3682 Oxford-Millville Road near Oxford, Ohio, with the purpose of committing an aggravated burglary. Tony Jones and DePew had once been friends, and for three or four months in 1982, Jones let DePew and his girlfriend, Debbie Sowers, rent the basement of the Jones residence. (Record pp. 72-73) Problems had thereafter developed between DePew and Jones, and when DePew would not agree to move out, Jones served a three-day eviction notice on DePew; in response, DePew threatened Jones that he would "get even one day." (R. p. 75)

On that evening, the victims, Teresa Jones, age 27, her sister Elizabeth Burton, age 12, and Teresa's daughters Aubrey, age 7, and Megan, age 1, were at the Jones home baking cookies and celebrating Megan's first birthday; Tony Jones was working the 3-11 shift at the Ford Motor Company plant in Sharonville, Ohio. Teresa was visited by her father, J.C. Burton, who had come over at 5:30 p.m. with Elizabeth and Teresa's brother Shane; after watching television until 10:00 p.m., Mr. Burton and Shane went home and left Elizabeth there to stay the night with Teresa, Aubrey and Megan. (R. pp. 61-63)

DePew's intention that evening was to steal money he believed to be kept in a closet; he told his girlfriend that he intended to replace some property he believed had been damaged by Jones with the money and get even with Tony Jones for the eviction. (R. p. 173) Between 9:30 and 10:00 p.m., Debbie Sowers drove DePew in his mother's car past the Jones residence several times that night until a car in the driveway (Mr. Burton's car) was gone. (R. pp. 176-7) Then DePew told Sowers to drive the car down a small county road behind the Jones house where DePew exited the car, telling her to drive away and return later. (R. p. 178)

As Petitioner later described in his statement to a sheriff's detective, h entered the Jones home through a back door when the house was dark, and as he not expect anyone to be home, he was startled when Teresa Jones found him inside and screamed. (R. p. 217) When he saw all three victims, DePew claimed he "freaked out" and just started swinging his knife. (R. p. 221) After he stabbed the three victims, he set a fire in the master bedroom; hearing the one-year-old baby cry out, he removed the child from her crib and took her outside, leaving her on a porch of an adjacent house before fleeing the scene.

On Debbie Sowers' return twenty minutes later, the Jones house was on fire; Sowers searched the back roads in the area for DePew, whom she found about one mile from the scene. He got into the car and told her that he set a curtain on fire, and that there was no one in the house. (R. pp. 179-181) The next day, after learning of the deaths of Teresa Jones, Aubrey Jones and Elizabeth Burton in the house, Sowers looked in DePew's coat and saw that his knife had spots of blood all over it. (R. p. 183) This knife, a replica of a 1918 U.S. Army trench knife, had a double-edged blade and a brass-knuckle-like, brass-plated grip, was never recovered. (R. p. 184)

At around 11:30 p.m., Tony Jones returned home to find his house ablaze, smoke billowing out of the windows and flames leaping from the house. He broke out windows and attempted to enter to save his wife and children, but there was no safe way to get inside. He went from house to house in the neighborhood, finally getting someone to help, and then called the fire department. He saw his daughter Aubrey and his wife's sister Elizabeth taken away in an ambulance, after firemen located them in the house. (R. p. 71) Aubrey Jones, who was dead on arrival at the hospital, died from twenty-one stab wounds. (R. pp. 143-144) Elizabeth Burton, who was still barely alive at arrival in the emergency room, died shortly thereafter due to hypovolemic shock caused by five stab wounds, fluid loss from the extensive burns to her body, and carbon monoxide contributory to her death. (R. p. 145) Firemen discovered the severely burnt body of Teresa Jones near the doorway of the master bedroom, (R. p. 105); she was determined to have died not from the fire, but from fourteen stab wounds inflicted to the front and back of her body. (R. p. 142) The stab wounds to all three were caused by a double-edged blade of the same type as DePew's Army trench knife. (R. p. 146)

The one-year-old, Megan, was rescued by a policeman who found her lying on the porch of next-door neighbors who were not at home that evening; the child was unharmed, though left to the elements on that very cold night. (R. p. 96)

At the death scene, the Butler County Sheriff's Department detectives photographed the ruins and gleaned evidence that the fire was arson (R. pp. 107-138), but little developed in the way of any investigatory leads until April 3, 1985, when Debbie Sowers, out of fear that DePew might hurt her or kill her, gave her information to Detective Sargeant Rick Sizemore and the prosecuting attorney. At 5:00 p.m. that day, Detective Sizemore and another detective located DePew driving his automobile at the mobile home park in Oxford where Sowers' mother lived; DePew was arrested and taken to Hamilton to the courthouse office of the prosecuting attorney. At 6:00 p.m., Sizemore and DePew went into one of the offices and the detective orally advised DePew of his Miranda rights. DePew then indicated that he understood his rights and would speak with Detective Sizemore. (R. pp. 208-209) Petitioner listened for the most part of several hours as Sizemore related the evidence revealed against him by Debbie Sowers, and eventually Petitioner told the detective about his commission of the killings. At approximately 12:45 a.m., an assistant prosecutor joined the detective and Petitioner in the room with a tape recorder and taped a forty-five minute interview in which DePew confessed to the triple murder in detail. (R. pp. 201-245) This tape-recorded statement was reduced to a twenty-two page typewritten statement, which Petitioner read and signed. (R. pp. 245-246) In this statement, Petitioner confessed to committing the aggravated burglary, murders, and arson; he also disclosed the motives of hatred, theft and revenge which culminated in the mass murder. (R. pp. 239-241)

On June 17, 1985, a jury trial commenced and on June 19, 1985, the jury's verdicts of guilty as to all three aggravated murder counts and all three specifications as to each were made. On June 19-21, 1985, the sentencing phase was conducted and after deliberation the jury made its recommendation of the death sentence on each of the three counts of aggravated murder. On June 25, 1985, the trial court found that the aggravating circumstances found by the jury were sufficient to outweigh the mitigating factors present in the case, and imposed the death penalty, filing a written opinion pursuant to Ohio Revised Code §2929.03(F). (Petition, Appendix pages A-66 to A-72).

REASONS WHY THE WRIT SHOULD BE DENIED

I. Alleged misconduct of a prosecuting attorney during the sentencing phase of a capital trial is subject to harmless error analysis under Satterwhite v. Texas, 486 U.S. ____, 100 L.Ed.2d 284, 108 S.Ct. _____ (1988), and Darden v. Wainwright, 477 U.S. 168, 91 L.Ed.2d 144, 106 S.Ct. 24 (1986), where it does not deprive the defendant of a fair trial.

Petitioner's proposition of law concerns purported instances of prosecutorial misconduct which the courts below held to be harmless error, both the Court of Appeals and Supreme Court of Ohio citing this Court's decision in **Darden v. Wainwright**, 477 U.S. 168 (1986). The circumstances in this case involve: 1) objections to cross-examination and argument by a prosecutor which were sustained and curative instructions were timely given by the trial court; 2) a prosecuting attorney's brief objectionable comment which was thereafter rebuked by timely curative instruction of the the trial court, and completely retracted and discredited by the prosecuting attorney himself; 3) objections to other portions of a prosecutor's argument which were not raised at trial, no assignment of error was made in the intermediate court of appeals relative thereto, and complaint was made in the first instance in the state's highest court; and 4) the state's trial and reviewing courts, upon statutorily-mandated independent review of the death sentence, concluded not only that the alleged prosecutorial misconduct was harmless, but also that the state has proved, by proof beyond a reasonable doubt, that the unusual number of aggravating circumstances of which the accused was found guilty overwhelmingly outweighed the relatively meager evidence of mitigating factors offered by the accused in the sentencing phase. Under the precedents of this Court, the harmless error analysis applicable to claims of prosecutorial misconduct is well established, and the courts below correctly applied this established precedent.

In **Darden** v. **Wainwright**, supra, the Court rejected a similar claim that improper remarks in a prosecutor's summation required the reversal of a conviction and death sentence. The **Darden** standards do not differ substantially from the guidelines established in Ohio case law, as the decision below represents; the question is not whether the remarks of a prosecuting attorney are undesireable or even universally condemned, but rather, the relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." **Darden**, Id. at 181, quoting **Donnelly** v. **DeChristoforo**, 416 U.S. 637, 643 (1974). Relevant to this inquiry are (1) whether the argument manipulates or misstates the evidence or implicates other specific rights of the accused, such as the right to counsel or the right to remain silent; (2) whether the objectionable content is invited by or responsive to the opening summation of the defense; (3) the trial court's instructions that their decision is to be made on the evidence alone, and that arguments of counsel are not evidence; and (4) the existence of overwhelming evidence against the accused, which reduces the likelihood that the jury's decision was influenced by argument. **Darden**, supra, at 181-182.

A review of the decision below will reflect the Ohio Supreme Court's conscientious adherence to the **Darden** standard; and while the court below was critical of certain prosecutorial remarks, it reached the conclusion that the remarks in question here were far less inflammatory than those complained of in **Darden**, and that the comments "did not contaminate the proceedings below to the point that [Petitioner's] right to a fair trial was destroyed" and "did not render the penalty stage of [Petitioner's] trial fundamentally unfair." **State** v. **DePew**, supra, at 288. Using the criteria of **Darden**, the court below found that the numerous complaints, "taken together or even standing alone," were harmless error beyond a reasonable doubt. First, the court found that the introduction of a photograph of Petitioner and his brother,[1] standing next to a marijuana plant, was error "since its probative value was nonexistent and its potential for prejudice was significant," but "given the overwhelming evidence supporting the existence of the nine aggravating circumstances admitted by [Petitioner], balanced against the relatively unremarkable evidence offered in mitigation * * *, it is beyond a reasonable doubt that the jury would have sentenced [Petitioner] to death without having seen this photograph. The factors supporting death as a penalty were so persuasive and so numerous that this single photograph cannot be regarded as having materially prejudiced [Petitioner]. Thus, the error was harmless beyond a reasonable doubt." **DePew**, Id., 38 Ohio St. 3d, at 287.

Secondly, the court below found that a prosecutor's question of a defense character witness as to his knowlegde that Petitioner had "got cut" in a knife fight was at best only an indirect inference of wrongdoing on Petitioner's part, that it did have some relevance to the witness's credibility on testimony as to Petitioner's peaceful character,[2] and that the trial court's curative instruction effectively admonished the jury to disregard the matter in their deliberations, **DePew**, Id., 38 Ohio St. 3d, at 284.

Thirdly, a prosecutor's comment in closing argument to the effect that had the Petitioner taken the stand under oath rather than make an unsworn statement, he would have been subject to cross-examination about any conviction after the date in question, was found to be "not so prejudicial as to require reversal", **DePew**, Id., 38 Ohio St. 3d, at 284, because "the prejudicial effect of the prosecutor's remark was greatly minimized not only by the curative instruction, but also by the prosecutor's apology to the jury, and by his assurance to the

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1. Clay DePew, Petitioner's brother, also testified as a defense character witness in the penalty stage. The photograph was introduced without objection (R. p. 510-511) at the penalty stage by the prosecution, along with literally volumes of snapshots of Petitioner taken throughout his earlier years, introduced by the defense. (R. p. 499)

2. Mike Dingledine, who was Petitioner's cousin and employed him briefly in April, 1985, testified a character witness in the penalty phase that Petitioner was "quiet" and "easy-going" and "if anything came up, it never bothered him," implying a non-violent character. (R. pp. 336-337) Cross-examination attempted to explore this witness's knowledge of this pertinent character trait of the Petitioner, and apparently, the witness knew that Petitioner got cut in a knife fight at a King Kwik and responded affirmatively (R. p. 341):

> **Q.** You knew he got cut in a knife fight over at King Kwik, didn't you?
>
> **A.** Yes, I did.

The prosecutor was acting under the belief that when the defense presented testimony of Petitioner's peaceful character, cross-examination is permitted to test the witness's credibility by inquiry into the basis of the witness's knowledge of Petitioner or the soundness of the character witness's standards of peacefulness. See **Michelson** v. **United States**, 335 U.S. 469 (1948); **State** v. **Elliott**, 25 Ohio St. 2d 249, 267 N.E.2d 806 (1971), vacated on other grounds, 408 U.S. 939 (1972); and Ohio Evidence Rule 405(A).

jury that they should forget his remark 'because there's nothing like that here.' By this statement, the jury was told by the prosecutor himself that no subsequent conviction had occurred." **DePew**, Id., 38 Ohio St. 3d, at 284.[3]

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3. The jury never knew it, but Petitioner had been convicted of an unrelated receiving stolen property offense, subsequent to the date of the murders but prior to the date of his arrest on these charges.

The context of the prosecutor's comment was that Petitioner chose to read an unsworn statement to the jury rather than testify under oath, thereby avoiding any cross-examination, Ohio Revised Code §2929.03(D)(2). In this unsworn statement, which immediately preceded the closing arguments of counsel, Petitioner said, (R. p. 507):

> * * * It may not be important to you, but I've never been arrested or convicted of anything before the night this happened. That's why it's hard on my, it's hard on my family.

Defense counsel's argument immediately preceding the prosecutor's remarks had capitalized on the unsworn statement and manipulated the fact that the trial court's ruling in limine barred the state from presenting a complete criminal history of the defendant who stood in the dock before this jury (R. p. 533):

> (By Mr. Garretson) It's clear, he's from a good family, he has no criminal history prior to that offense -- there's nothing here in evidence -- [the prosecuting attorney] forgot to talk about that -- **there's nothing here to say he has a criminal history. And you can bet if there was it would be here.**

[Emphasis added.] Defense counsel later continued to stress, "there's a lack of any criminal history in this case." (R. p. 562) Mr. Holcomb's closing argument (R. pp. 566-585) discussed the evidence of aggravating circumstances, the relative insignificance of Petitioner's character evidence for mitigating these heinous offenses, and discussed the nature of Petitioner's unsworn statement, as is permitted in Ohio. See **State** v. **Hopes**, 19 Ohio St. 3d 108, 116, 483 N.E.2d 140 (1985); **State** v. **Scott**, 26 Ohio St. 3d 92 at 107-108, 497 N.E.2d 55 (1986). In explaining that the result of the defendant's choice to be unsworn is to bar cross-examination, the prosecuting attorney stated (R. p. 578):

> (By Mr. Holcomb) He wouldn't sit in that chair because then he would have to answer my questions. And then I would ask him if he's ever been convicted of a criminal offense after the date in question in this case. And I would have * * *.

An interrupting objection to the statement was promptly sustained, and a strong curative instruction was given that directed the jury not to draw any inference from the argument, admonishing the prosecutor and jury that "it's improper to make reference to anything that is not in evidence * * *." (R. p. 580) Following that admonition, Mr. Holcomb retracted his previous statement completely (R. pp. 580-581):

> Yes, your Honor, I would sincerely like to apologize for asking that question, and I would tell the jury to disregard it; I shouldn't have said that. I wish you would just forget that because **there's nothing like that here.**

The trial court overruled a motion for mistrial, noting that it gave curative instructions and that the most curative remarks were from the prosecutor himself. (R. p. 587)

Finally, as to the remaining matters now raised by Petitioner, (enumerated in the Petition at pages 5 - 7 as items III, V, VI, VII and VIII), the complete record of proceedings below would establish that none of these matters was raised in or considered as error in the trial court and the court of appeals, and none was raised by Petitioner in the Supreme Court of Ohio.[4] (Only one of them, Item III, was considered sua sponte by the Ohio Supreme Court's majority opinion.) The failure to object to these matters in the courts below constitutes a waiver of the issues, or is at the very least a factor to be considered as sufficient to

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4. None of these issues has been briefed by the State until this writing, because of the failure of the Petitioner to raise the issues on appeal.

Item III concerned comment on the fact that Petitioner's unsworn statement was not under oath, a matter which was obvious to the jury, see **State** v. **Jenkins**, 15 Ohio St. 3d 164, 473 N.E.2d 264, certiorari denied, 472 U.S. 1032 (1985), and these closing remarks added nothing to the impression that had already been created by Petitioner and his counsel by advising the jury that the Petitioner's statement was unsworn, see **Lockett** v. **Ohio**, 438 U.S. 586, 594-595 (1978).

Item V concerns a reply to defense counsel's argument that any life sentence recommended by the jury would mean a death sentence in prison in practical terms; the prosecutor was simply pointing out the fact that the court was not required to impose three life sentences for three deaths consecutively, and that in any event, parole eligibility was a built-in factor of any life sentence. Again, this argument stated the obvious, see **Lockett** v. **Ohio**, Id., and moreover the remark was invited by or responsive to defense summation, see **United States** v. **Robinson**, 485 U.S. ___, 99 L.Ed.2d 23, 108 S.Ct. ___ (1988); **Darden** v. **Wainwright**, supra, at 157; **United States** v. **Young**, 470 U.S. 1, 13 (1985).

Item VI concerns a remark based on inferences drawn from evidence presented by the state at the guilt-phase of the trial, which was the proper subject of comment and deliberation by the jury in the penalty phase, see Ohio Revised Code §2929.03(D)(2). The trial court on motion of the state had granted Petitioner's girlfriend, Debbie Sowers, immunity from prosecution for her part in staging the aggravated burglary of the Jones home by Petitioner, and she had indeed testified that she came forward on April 3, 1985, the afternoon before Petitioner's arrest, only after she feared that Petitioner may have hurt or killed her. (R. p. 194-195) Of course, Petitioner only confessed after his girlfriend had turned him in, and this remark of the prosecutor was factually based.

Item VII concerns a remark on the lack of evidence; the remark of the prosecutor that Petitioner's so-called "common-law wife," (his girlfriend Debbie Sowers), was available but was not called in mitigation by the Petitioner was a comment on the obvious, **Lockett** v. **Ohio**, supra, and did not implicate any constitutional right of the Petitioner, e.g., his right not to testify.

Finally, Item VIII concerns argument classified by Petitioner as a "law and order" appeal. We think that Petitioner paints with too broad a brush, and at the Appendix, hereto, Respondent attaches a photocopy of page 570 of the Record as cited by Petitioner, in its entirety. This Court will see for itself that the prosecutor's argument urged the jury not to take their job lightly, and was an appeal for deterrence of the crime committed by Petitioner, the killing of three innocent victims in their home. The appeal to the jury here to take their responsibility most seriously is the converse of the error committed in **Caldwell** v. **Mississippi**, 474 U.S. 320 (1985), and when discussing considerations relevant to the death penalty, certainly deterrence (and even retribution) may be properly discussed, see **Gregg** v. **Georgia**, 428 U.S. 153 (1976).

negate the prejudice necessary to establish a constitutional violation. See **Estelle** v. **Williams**, 425 U.S. 501 (1976). "Any other approach would rewrite the duties of trial judges and counsel in our legal system." Id., at 512.

It is thus abundantly clear that the Ohio Supreme Court adhered to the principles established in **Darden** v. **Wainwright** in reaching their decision. Further, another recent decision of this Court, **Greer** v. **Miller**, 483 U.S. ____, 97 L.Ed.2d 618, 107 S.Ct. ____ (1987), is consistent with the Ohio Supreme Court's analysis of remarks by the prosecutor which were met by the trial court's stern admonishments and curative instructions to the jury.[5] We have virtually the same type of facts here as in **Greer** v. **Miller**, where a prosecutor's comment in closing argument was met with an immediate objection and curative instructions, plus in the present case we have an apology by the prosecutor disclaiming any inference that could have been drawn from the comment.

Petitioner unconvincingly attempts to distinguish the Court's decision in **Darden** v. **Wainwright** as being applicable only to claims of guilt-phase prosecutorial misconduct. While Petitioner correctly notes that the **Darden** case analyzed the improper prosecutorial comments in the context of the guilt-stage of a bifurcated capital trial, and a footnote of the Court stated that this context "greatly reduc[ed] the chance that they had any effect at all on sentencing," Id. at 183, n. 15, it was clear that **Darden** was a death penalty case, the argument of the prosecutor was not limited to the issue of guilt but was an exhortation to the jury to render the death penalty, and there was nothing said by the Court in **Darden** to demonstrate a clear inapplicability of its analysis to penalty-stage prosecutorial comments. As noted by a dissenting member of the Court, there was

5. In **Greer** v. **Miller**, the prosecutor's question of a defendant regarding his postarrest, post-Miranda silence was promptly cut off by a defense objection and a trial court's admonition that the jury was to disregard the question and refrain from drawing any inference from it. The Court held that there was no violation of the rule of **Doyle** v. **Ohio** (1976), 426 U.S. 610, in that the trial court did not permit use of postarrest silence as impeachment; the Court further held that the prosecutor's attempt to violate the **Doyle** rule by asking an improper question in the presence of the jury was not prosecutorial misconduct which "so infected the trial with unfairness as to make the resulting conviction a denial of due process," **Donnelly** v. **DeChristoforo**, supra, 416 U.S., at 643. Viewing the remark in context, citing **Darden** v. **Wainwright**, supra, and **Donnelly**, supra, the Court found that the sequence of events -- a single question, followed by an immediate objection and two curative instructions -- clearly indicated that the prosecutor's conduct did not violate the defendant's due process rights. **Greer** v. **Miller**, supra, 97 L.Ed.2d at 630-631.

little practical difference between such error in the guilt phase in **Darden** and similar error in the penalty phase, as the penalty phase in Darden's case was limited to a very brief hearing which immediately followed the offending remarks and the jury's guilt verdict. **Darden**, Id. at 196 n.3 (Blackmun, J., dissenting).

Moreover, a subsequent decision by the Court last term indicates that a constitutional error in the penalty stage of a capital trial is properly subject to harmless error analysis. **Satterwhite** v. **Texas**, 486 U.S. ____, 100 L.Ed.2d 284, 108 S.Ct. ____ (1988). In that case, while finding it impossible to find harmless the admission of psychiatric testimony on the issue of the accused's future dangerousness, a critical issue under Texas law in the sentencing jury's decision to impose a death sentence, the Court held that the harmless error rule set forth in **Chapman** v. **California**, 386 U.S. 18 (1967), would apply to a constitutional violation at the sentencing phase of a capital trial, [the violation in **Satterwhite** being the admission of psychiatric testimony in violation of the Sixth Amendment right set out in **Estelle** v. **Smith**, 451 U.S. 454 (1981)]. In so holding, the Court stated, "we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." **Satterwhite** v. **Texas**, supra, 486 U.S., at ___ , 100 L.Ed.2d, at 295. By the same token, assuming that prosecutorial misconduct would constitute a due process violation (under the Fifth and Fourteenth Amendments) equal to a Sixth Amendment violation of **Estelle**, the harmless error analysis of **Chapman** would also be applicable to this constitutional claim at the sentencing stage of proceedings. See Argument II, infra.

II. Consistent with the decision in Satterwhite v. Texas, 486 U.S. ___, 100 L.Ed.2d 284, 108 S.Ct. ___ (1988), harmless error analysis is applicable to alleged errors of prosecutorial misconduct occurring during the sentencing phase of a capital proceeding.

As to the second question presented, it is clear from the decision below that the Ohio Supreme Court's harmless error analysis of the alleged prosecutorial misconduct was consistent with this Court's decision in **Satterwhite** v. **Texas**, 486 U.S. _____, 100 L.Ed.2d 284, 108 S.Ct. _____ (1988). It is Respondent's position that where the reviewing court finds that the evidence supporting the sentence of death was "overhelming" and that the remarks in question did not render the penalty phase of the trial fundamentally unfair, in accordance with **Darden** v. **Wainwright**, supra, the reviewing court has complied with the harmless error analysis error required by **Satterwhite** v. **Texas**.

In this case, the Ohio Supreme Court found, first, that the erroneous use of a prejudicial photograph was error, but stated,

> "given the overwhelming evidence supporting the existence of the nine aggravating circumstances admitted by [Petitioner], balanced against the relatively unremarkable evidence offered in mitigation * * *, it is beyond a reasonable doubt that the jury would have sentenced [Petitioner] to death without having seen this photograph. The factors supporting death as a penalty were so persuasive and so numerous that this single photograph cannot be regarded as having materially prejudiced [Petitioner]. Thus, the error was harmless **beyond a reasonable doubt.**" **DePew**, Id., 38 Ohio St. 3d, at 287, [emphasis added].

On that point, therefore, the court below expressly applied the "beyond a reasonable doubt" standard to the error in question. Secondly, the court below determined, with reference to the other remarks of the prosecutor:

> "The comments in the instant cause did not contaminate the proceedings to the point that [Petitioner's] right to fair trial was destroyed. The evidence supporting the sentence of death was indeed overwhelming. The remarks in question did not render the penalty stage of [Petitioner's] trial fundamentally unfair." **DePew**, Id., 38 Ohio St. 3d, at 288.

Moreover, with repect to the evidence was in support of the death sentence, the court below found, **"beyond a reasonable doubt**, that the unusual number of aggravating circumstances in this case is not outweighed by the relatively meager mitigating factors offered by [Petitioner]." **DePew**, Id., 38 Ohio St. 3d, at 292, [emphasis added]. Thus, by implication, the court below was applying the "beyond a reasonable doubt" standard to the error in question.

In **Satterwhite**, the Court held that the harmless error rule set forth in **Chapman** v. **California**, 386 U.S. 18 (1967), applies to a constitutional violation [the admission of psychiatric testimony in violation of the Sixth Amendment right set out in **Estelle** v. **Smith**, 451 U.S. 454 (1981)] at the sentencing phase of a capital trial. In so holding, the Court stated, "we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." **Satterwhite** v. **Texas**, supra, 486 U.S. at ____, 100 L.Ed.2d, at 295. Noting that the Texas court's decision simply found that the evidence was "sufficient," absent the offending psychiatric testimony, for the jury to find in favor of the State's case on the material issue of future dangerousness, this Court reversed, holding that harmless error analysis does not concern the sufficiency of the legally admitted evidence to support the death sentence, but rather "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' **Chapman**, 386 U.S., at 24." **Satterwhite**, supra, at ____, 100 L.Ed.2d, at 295, (emphasis added). The Court in **Satterwhite** concluded that the improperly admitted psychiatric testimony was "powerful and unequivocal," that the prosecution had placed "great weight" on it in the penalty phase closing arguments, and that the offending expert testimony directly went to a "critical" finding of the accused's future dangerousness; thus, the Court found it impossible to say beyond a reasonable doubt that the expert testimony on the issue did not influence the sentencing jury. Id. at ____, 100 L.Ed.2d, at 296. Thus, it was a significant factor in **Satterwhite** that in Texas, the jury in the sentencing verdict must answer the very question that the improperly admitted psychiatric testimony purported to answer. However, that is not true in the case at bar; first of all, the trial court sustained defense objections to the prosecutor's comments in the case at bar, and gave curative instructions to the jury. See **Greer** v. **Miller**, supra. Secondly, while in **Satterwhite** the objectionable material was evidence to be considered by the jury which directly bore on the issue to be decided under Texas law, that was not the case here; unlike **Satterwhite**, the jury was given the usual instruction that the arguments of counsel are not evidence, and the alleged error of prosecutorial misconduct did not go to the very heart of the question that the jury must answer in rendering the sentencing recommendation.

Thirdly, the comments were not as in the case of **Caldwell** v. **Mississippi**, 472 U.S. 320 (1985), wherein the offending remarks alluding to further appellate review of the death sentence were an attempt to diminish the jury's appropriate sense of responsibility in their decision on the penalty. Rather, a review of the prosecutor's comments in their entirety (and not simply excerpts presented in the Petition) together with the trial court's instructions would establish, under the totality of the circumstances, that the jury was appropriately guided as to the nature of its task, without diminishment of their responsibility; indeed, the prosecutor's summation urged the jury to consider its task with the utmost responsibility.

Further, if there remains any doubt whatsoever that the Ohio Supreme Court applies the correct standard of review in harmless error case, that doubt was put to rest in a case decided two weeks after **DePew**, in **State** v. **Williams**, 38 Ohio St. 3d 346, 528 N.E.2d 910. Justice Douglas, the author of the opinion herein, specially concurred in **Williams** to discuss the point that the Ohio Supreme Court has consistently applied the harmless error standard set forth in **Chapman**, supra, and in **United States** v. **Hasting**, 461 U.S. 499 (1983) and **Delaware** v. **Van Arsdall**, 475 U.S. 673 (1986). See also **State** v. **Zimmerman**, 18 Ohio St. 3d 43, 479 N.E.2d 862 (1985).

In conclusion, unlike the Texas courts in **Satterwhite**, the Ohio Supreme Court below found the evidence in the case at bar compelling the death sentence was not only sufficient, but **overwhelming**. Consistent with the decision in **Satterwhite**, supra, the Court below held that the harmless error rule set forth in **Chapman**, supra, applies to a constitutional violation [prosecutorial misconduct in violation of the Fourteenth Amendment due process rights set out in **Darden** v. **Wainwright**, supra], at the sentencing phase of a capital trial. Contrary to the Petitioner's claim, and unlike the Texas court in **Satterwhite**, the decision of the court below clearly did not apply a mere "sufficiency of the evidence" test to determine that the due process claim of the Petitioner, based on instances of prosecutorial misconduct, was harmless.

CONCLUSION

Because the decision of the court below is consistent with the applicable decisions of this Court, because it is not shown in the petition for certiorari that there is a conflict between the decision in this case and any decision of another state court, and because the claims made herein are not substantial, see **Maggio** v. **Williams**, 464 U.S. 46 (1983), this Court should decline to review the instant case.

Petitioner DePew's application for certiorari should be denied.

Respectfully submitted,

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you watch the news, or you listen to the news - you know, you hear about this and that, and you say, what are they doing down at the courthouse. You're talking about some trial. You say, what are they doing - what are those Judges doing down there? Or what are those juries doing down there - what's going on down at that courthouse, what are they doing?

Well, now, that "they" is you. The "they" you talked about is you. And I kind of want to get things into perspective here, like this. With the first living breath that each of us takes, isn't it true that our eventual death is written. The price of life for all of us - the price of life is death. You twelve here today, American citizens tried and true, you're going to set the price for this triple homicide. You can make the price cheap, if you find mitigation or leniency, you can give him a discount. Or you can make the price expensive for this defendant and everybody like him. You can say, yes, it's still true in the United States of America, that a man's home is his castle. His shelter from the world. You can say yes, it's true, and we affirm it that it's a place of refuge for his wife and his children, a place of safety, a place of happiness and contentment, where they don't have to live in fear. Where children can sleep safely in God's peace at night. Where children can help their mother make Christmas cookies, or sister. And snuggle up in a warm bed and lie down to dreams - pleasant dreams.

Judge JOHN R. MOSER
Common Pleas Court
Butler County, Ohio